All of the states except California and Louisiana have adopted the common law doctrine, that where two or more persons perish in the same disaster there is no presumption of survivorship, nor even of synchronous death, but that the burden is on him who must establish survivorship as a condition precedent to his right. See the exhaustive note to *In re Willbor*, 51 L. R. A. 863. But the slightest evidence is sufficient to overcome the burden. *Brome* v. *Duncan* (Miss.), 29 South. 394; *Ehle's Will*, 73 Wis. 445, 41 N. W. 627; *Smith* v. *Croom*, 7 Fla. 81. The insurance cases all agree as to these general principles, but there is a decided conflict as to the burden of proof and as to the person in whom the insurance was vested at the time the insured and his beneficiary died. This case seems to offer a rule by which many of the cases at least may be reconciled. An ordinary insurance policy creates a vested interest in the beneficiary. *Bank* v. *Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41, 32 L. ed. 370; *Ricker* v. *Charter Oak Insurance Co.*, 27 Minn. 193, 6 N. W. 771. But this does not prevent a person from reserving the right by contract to make any change he pleases in the beneficiary. *Splawn* v. *Chew*, 60 Tex. 532. In such a case there is no vested interest in the beneficiary until the insured dies. He has a mere expectancy. MAY ON INSURANCE, § 399 m. And where fraternal or other orders expressly permit a change of beneficiaries without the consent of the first appointee, it is settled by the weight of authority, that the beneficiary acquires no vested interest. *Martin* v. *Stubbings*, 126 Ill. 387, 18 N. E. 657; *Supreme Conclave* v. *Cappella*, 41 Fed. 1.

LIMITATION OF ACTIONS—MALPRACTICE.—A surgeon operating upon a patient for appendicitis, closed the incision without removing a sponge which he had placed in the abdominal cavity. This condition continued to the great discomfort of the patient, until the professional relation was terminated. In an action for malpractice, *Held*, that the statute of limitations began to run, not at the time of the operation, but only when the professional relation was terminated. *Gillette* v. *Tucker* (1902),—Ohio St.—, 65 N. E. Rep. 865.

This case was brought up from the circuit court and stands as there decided, because the judges of the supreme court were evenly divided as to its affirmance or reversal. The question is: When may the plaintiff's cause of action be said to have accrued? While the exact point is not decided, it is reasonable to believe that medical and legal authorities would agree that the failure to remove such foreign matter after an operation is such a conjunction of negligence and injury as to give the patient a right of action immediately, without waiting for the malignant and extreme results. The question must then be resolved to this: Granting that a cause of action accrued at the time of the operation, was the subsequent failure of the surgeon to remove the sponge, a new and continuous cause of action, arising constantly until the termination of the professional relation? The opinion, affirming the judgment of the lower court, answers this question in the affirmative, relying principally upon two cases: *Railroad* v. *Franz*, 43 Ohio St. 623, 4 N. E. 88, and *Perry* v. *Ry. Co.*, 43 Ohio St. 451, 2 N. E. 854. But these cases refer to continuing trespass and nuisance, and *Wilcox* v. *Plummer*, 4 Pet. (U. S.) 172 is good authority for the proposition that there is no analogy between malpractice and continuing trespass and nuisance. The vigorous dissenting opinion contends that the cause of action accrued at the time of the operation, and that the subsequent injury due to the failure of the physician to discover and remove the sponge, did not give the plaintiff a new cause of action, but was merely incidental and consequential to the principal act. The cases cited in this opinion are in point, and seem to be decisive. See especially, *Wilcox* v. *Plummer*, 4 Pet. 172, 7 L. ed. 821; *Moore* v. *Juvenal*, 92 Pa. St. 484; *Coady* v. *Reins*, 1 Mont. 424. The principal case must be distinguished from those

cases wherein the wrong and the injury are not cotemporaneous. In such cases the cause of action does not accrue until the occurrence of the injury complained of. See *Darley Main Colliery Co.* v. *Mitchell*. 11 App. Cas. 127, 21 Cent. Law Jour. 148 (case annotated), Mechem, Cases on Damages 117. Mr. Webster's argument in *Wilcox* v. *Plummer*, *supra*, seems pertinent: "If one borrows money, it is his duty to pay it; and he is in default every day and commits a new injury every day until he does pay. Yet the statute runs in his favor from the day when he first ought to pay."

MANDAMUS—TO VACATE PROVISIONAL INJUNCTION IMPROPERLY GRANTED.—A quarter section of farming lands within the limits of the Omaha Indian Reservation had been alloted to Mary and Blanche Phillips, as members of the Omaha Indian tribe, in accordance with the act of congress. By virtue of a written lease executed by Oran B. Phillips, husband of Mary and father of Blanche, the relator entered into exclusive possession of the land and began farm work. Later, Phillips, as guardian of Blanche and administrator of the estate of Mary, instituted actions to enjoin the relator from going upon the real estate in question, or from interfering in any way with the crops growing thereon, on the ground that the relator's lease was invalid and hence his possession unlawful. The defendant, as judge, granted provisional injunctions, and this action was brought to compel defendant, by mandamus, to vacate these injunctions. *Held*, that mandamus will issue. *State ex rel. Reynolds* v. *Graves* (1902), — Neb. —. 92 N. W. Rep. 144.

The provisional injunction, said the court, never was designed to transfer the possession of property from one litigant to another. A court or judge cannot thus dispossess a party of real or personal property which he claims as his own, and compel him to establish his title in order to obtain restitution; Citing *Railroad Co.* v. *Circuit Judge*, 44 Mich. 479, 7 N. W. 65; *Calvert* v. *State*, 34 Neb. 616, 52 N. W. 687. Mandamus, continued the court, will be employed to coerce judicial action in cases where courts or magistrates have exceeded their jurisdiction; citing *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214; *State* v. *Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; *City of Huron* v. *Campbell*, 3 S. D. 309, 53 N. W. 182. Clearly a provisional injunction may not transfer the possession of property. *Lacassagne* v. *Chapuis*, 144 U. S. 119, 12 Sup. Ct. Rep. 659, 36 L. ed. 368; *City of Detroit* v. *Judge*, 79 Mich. 384, 44 N. W, 622; HIGH ON INJUNCTIONS (3rd ed.), § 14. But it is not so clear that mandamus may be invoked. The general rule is, that mandamus will not lie to control the exercise of the discretion of the inferior courts. HIGH'S EXTRAORDINARY LEGAL REMEDIES, § 156. Some courts, however hold, that mandamus will lie when the court or officer has clearly abused his discretion or acted in manifest disregard of the legal rights of individuals. *City of Detroit* v. *Judge*, *supra; Wood* v. *Strother*, 76 Cal. 545, 18 Pac. 766; *Village of Glencoe* v. *The People*, 78 Ill. 382; *State* v. *Public Schools*, 134 Mo. 296, 35 S. W. 617; *Ex parte South and North Ala. R. R. Co.*, 44 Ala. 654. Where the rights of the individuals are so clear that it is really not a matter of discretion at all, and there is no other adequate remedy at law, it would seem that mandamus should issue. *State* v. *Lazarus*, 36 La. An. 578. The courts of Michigan have made use of mandamus to an extent not recognized by other states: SPELLING'S EXTRAORDINARY RELIEF, § 1393. For a general discussion of the supervisory control of the superior over the inferior tribunals, see the exhaustive note to *State* v. *Johnson*, 51 L. R. A. 33.

MARRIAGE—BIGAMY—CURATIVE STATUTE—VALIDITY.—The statute 1895 C. 427, of Massachusetts provides that where a marriage has been solemnized with due legal ceremony, and the parties cohabit, the marriage, though biga-